Supreme Court, U.S.
FILED

No. 001190 JAN 22 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

GEORGE WADE KNEZEVICH,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

PETITION FOR WRIT OF CERTIORARI

BRYAN J. BROWN*
STEPHEN M. CRAMPTON
AMERICAN FAMILY ASSOCIATION
CENTER FOR LAW & POLICY
100 Parkgate Drive, Suite 2-B
P.O. Drawer 2440
Tupelo, MS 38803-2440
(662) 680-3886

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6899

QUESTION PRESENTED

Is ORS 166.025(1) a vague and overbroad statute because it renders unlawful "the making of unreasonable noise in a manner which *recklessly creates a risk* of public inconvenience, *annoyance* or alarm," and is construed by the Oregon Supreme Court to proscribe unamplified speech occurring in public fora which law enforcement officials, in their unbridled discretion, conclude "is not constitutionally protected speech but merely *a guise to disturb persons*?"

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ORDERS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF NOTIFICATION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

BACKGROUND 3

REASONS FOR GRANTING THE WRIT 5

1. A decision addressing the issue presented is sorely needed 5

2. Governments other than Oregon yet maintain the 1962 Model, while some governments have scrapped the Model as unconstitutional 7

ARGUMENT 10

1. The 1962 Model fails to define or limit unreasonable noise, alarm or annoyance 10

2. The 1962 Model fails to define when a risk of public inconvenience, annoyance or alarm is recklessly created 11

3. The so-called limiting construction Oregon's courts place upon the 1962 Model does not remedy its significant constitutional defects .. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Alegata v. Commonwealth, 231 N.E.2d 201 (Mass. 1967) 8

City of Fairborn v. Grills, 1994 Ohio App. LEXIS 2467 (Ohio App. 1994) 7

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 100 L.Ed.2d 771, 108 S. Ct. 2138 (1988) 14

City of Middleton v. Ramsey, 535 N.E.2d 315 (Ohio App. 1988) 7

Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L.Ed.2d 584 (1972) 7

Commonwealth v. A Juvenile, 334 N.E.2d 617 (Mass. 1975) 6, 8

Connecticut v. Indrisano, 640 A.2d 986 (Conn. 1994) 5, 8

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 100 S. Ct. 790, 63 L.Ed.2d 22 (1980) 15

Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L.Ed.2d 101 (1992) 15

Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L.Ed.2d 597 (2000) 6

Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982) 15

Johnson v. United States, 394 U.S. 952, 89 S. Ct. 1277, 22 L.Ed.2d 489 (1969) (Marshall, J., dissenting from denial of *certiorari*) 9

Long v. L'Esperance, 701 A.2d 1048 (Vt. 1997) 7

TABLE OF AUTHORITIES – Continued

Page

Marks v. Anchorage, 500 P.2d 644 (Alaska 1972) 6, 8

New Hampshire v. Murray, 605 A.2d 676 (N.H. 1992) 7

Ohio v. Scott, 704 N.E.2d 265 (Ohio App. 1997) 7

Pennsylvania v. Mastrangelo, 414 A.2d 54 (Pa. 1980) 7

People v. Tichenor, 680 N.E.2d 606 (N.Y.), *cert. den'd*, 118 S. Ct. 307 (1997) 7

State v. Marker, 536 P.2d 1273 (Or. Ct. App. 1975) 4, 5, 6, 13, 14

State of Oregon v. George Wade Knezevich, 995 P.2d 598, 165 Ore. App. 315 (Or. Ct. App. 2000) (affirmed without opinion) 1

State of Oregon v. George Wade Knezevich, 331 Ore. 244, 2000 Ore. LEXIS 766 (2000) (denying review) 1

Sterling v. State, 701 So.2d 71 (Ala. Crim. App. 1997) 7

Terminiello v. Chicago, 337 U.S. 1, 93 L.Ed. 1131, 69 S. Ct. 894 (1949) 10, 12, 13, 14

Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989) 15

Zenith Radio Corp. v. United States, 437 U.S. 443, 98 S. Ct. 2441, 57 L.Ed.2d 337 (1978) 15

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. Amend. I ..... *passim*

U.S. Const. Amend. XIV 2, 6

28 U.S.C. § 1257(a) 1

18 PA. Cons. Stat. § 5503(a) (2000) 7

37 P.S. § 102 (2000) 7

Ala. Code § 13A-11-7 (2000) 7

Conn. Gen. Stat. § 53a-182 (1999) 7

Del. Code Ann. 11 § 1301 (2000) 7

Ky. Rev. Stat. Ann. § 525.060 (Baldwin 2000) 7

Model Penal Code § 250.2 (Proposed Official Draft 1962) 5

N.H. Rev. Stat. Ann. § 644:2 (2000) 7

N.Y. Penal Law § 240.20 (Consol. 2000) 7

Ohio Rev. Code Ann. § 2917.11 (Anderson 2000) 7

Okla. Stat. 21 § 1321.8 (1999) 7

Or. Rev. Stat. § 166.025 ..... 4, 5

Or. Rev. Stat. § 166.025(1) 3

Or. Rev. Stat. § 166.025(1)(b) 2, 5

S.D. Codified Laws Ann. § 22-13-1 (2000) 7

Utah Code Ann. § 76-9-102 (2000) 7

Vt. Stat. Ann. 13 § 1026 (2000) 7

Wash. Rev. Code § 43.06.240 (2000) 7

TABLE OF AUTHORITIES – Continued

Page

Wash. Rev. Code § 43.06.010(12) (2000) 7

Rule 29.4(b) & (c) of the Supreme Court 1

OTHER AUTHORITIES

25 C.F.R. § 11.441 (2000) 9

36 C.F.R. § 2.7 (1982) 9

50 C.F.R. § 38.9 (2000) 9

47 Fed. Reg. 11,598 (1982) 9

48 Fed. Reg. 30,282 (1983) 9

58 Fed. Reg. 54,406 (2000) 9

PETITION FOR A WRIT OF CERTIORARI

The undersigned counsel, on behalf of Petitioner George Wade Knezevich, respectfully pray that a writ of *certiorari* issue to review the judgment of the Supreme Court of the State of Oregon in the above-entitled proceeding.

ORDERS BELOW

State of Oregon v. George Wade Knezevich, Multnomah County Circuit Court No. 9803-42304; *State of Oregon v. George Wade Knezevich*, 995 P.2d 598, 165 Ore. App. 315 (Or. Ct. App. 2000) (affirmed without opinion); *State of Oregon v. George Wade Knezevich*, 331 Ore. 244, 2000 Ore. LEXIS 766 (2000) (denying review).

STATEMENT OF JURISDICTION

The Oregon Supreme Court denied *certiorari* on October 24, 2000. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF NOTIFICATION

Notification has been delivered to the following pursuant to the demands of Supreme Court Rule 29.4(b) & (c): The Attorneys General of the United States, Kentucky, Connecticut, New York, Alabama, Pennsylvania, Ohio, Vermont, South Dakota, New Hampshire, Utah and Delaware.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Oregon Revised Statutes 166.025(1)(b), Disorderly Conduct. (1) A person commits the crime of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:

* * *

(b) Makes unreasonable noise; App. 45.

First Amendment to the Constitution of the United States. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the Constitution of the United States, Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

The few facts necessary to this appeal are contained in the briefs filed below.[1] These facts are contained in Mr. Knezevich's brief filed in the Oregon Court of Appeals, and Oregon's response, in which "the state accept[ed] defendant's statement of the case as adequate for review, as supplemented by the facts set forth in the state's supplemental statement of facts and argument." App. 4. Thus the factual recital of Mr. Knezevich's appellate brief, and Oregon's appellate brief (supplemental statement of facts and argument sections), are included in the appendix of this petition for review.

BACKGROUND

Mr. Knezevich was convicted before the Multnomah County Circuit Court of violating ORS 166.025(1). App. 1-13. The charge of disorderly conduct arose out of a situation which took place at 11:30 a.m., on the public sidewalk adjacent to a busy thoroughfare, within the city limits of Portland, Oregon. App. 30-31; App. 22. Mr. Knezevich held a cross, a religious sign and "preached" without the benefit of an amplification device. App. 30-34. The arresting officer believed that Mr. Knezevich had a "right to demonstrate" in the area which he occupied, but that he had a duty to "keep his speaking to a

[1] The facts, however, are actually of little consequence given the tremendous breadth and scope of ORS 166.025(1). Thus this petition for *certiorari* is, for all practical purposes, a facial challenge.

normal tone of voice." App. 7. After repeated warnings, Mr. Knezevich was arrested for "making unreasonable noise." App. 7-8. No device was employed to measure the volume of Mr. Knezevich's communications. App. 32. The State adduced no evidence supporting (the unalleged) charge that Mr. Knezevich's activities presented a "clear and present danger of violence." App. 33.

The trial court repeatedly noted that the burden the State carried was only to prove, "by the preponderance of the evidence, that [Mr. Knezevich's] conduct was such as to recklessly create a risk . . . of causing public inconvenience, annoyance or alarm." App. 10-12. The disorderly conduct charge was based, according to the trial court, on the allegation that "[Mr. Knezevich] recklessly created a risk [of] public inconvenience, annoyance or alarm by making unreasonable noise." App. 15. The trial court found that Mr. Knezevich did not "intend to cause public inconvenience, annoyance, or alarm," instead finding Mr. Knezevich guilty because his communications *"could* cause public inconvenience, annoyance, or alarm." App. 12; App. 36. (Emphasis on tape).

The State argued, on appeal, that Oregon's highest court has recognized that "[t]he plain language of [ORS 166.025] does not require proof of an actual impact on the public, but only creation of a risk of such impact." App. 20. Oregon rested its successful argument for the facial validity of the statute upon state court rulings from the mid-1970's to mid-1980's, and especially relied upon the so-called "limiting construction" contained within *State v. Marker*, 536 P.2d 1273 (Or. Ct. App. 1975). App. 14-20, 24-27. ("[U]nder *Marker*, the use of speech as a guise to disturb others is not constitutionally protected.") App. 17.

Mr. Knezevich raised his concerns as to the constitutionality of the statute during his trial, App. 11; App. 32, 34-36, before the Oregon Court of Appeals, App. 17-18, 23-25, and before Oregon's Supreme Court. App. 38-42. Both courts of appeal affirmed the trial court's decision without written opinions. Thus the Oregon courts passed on clear opportunity to revisit their now 26-year-old *Marker* decision (approving ORS 166.025(1)(b) as constitutional and defining disturbing speech as constitutionally unprotected) and the now four-decades-old language of the statute challenged herein.

Oregon statute 166.025 is a codification of Model Penal Code § 250.2 (Proposed Official Draft 1962).[2] It is hereinafter referred to as the "1962 Model" and "Model." Many other governments have made use of this Model, and many still do. *See infra & supra.*

REASONS FOR GRANTING THE WRIT

1. A decision addressing the issue presented is sorely needed.

Oregon's Supreme Court and legislature, by enacting, maintaining and refusing to retire ORS 166.025(1)(b), have decided an important federal question affecting free speech rights in quintessential public fora in a manner which is contrary to both this Court's jurisprudence and the recent rulings of other state supreme courts. Oregon's

---

[2] *Connecticut v. Indrisano*, 640 A.2d 986, 993 n.7 (Conn. 1994).

courts have construed the 1962 Model in a manner allowing government officials to restrain unamplified speech in traditional public fora during daylight hours on the ground that it is "disturbing" and "could create" the "risk of public inconvenience, annoyance or alarm." By contrast, an Alaska appellate court struck virtually identical language as unconstitutional almost 30 years ago, *Marks v. Anchorage*, 500 P.2d 644, 652-53 (Alaska, 1972), and the Massachusetts Supreme Court likewise scrapped the 1962 Model in the very same year that the Oregon court declared the Model constitutional in *Marker*. *See Commonwealth v. A Juvenile*, 334 N.E.2d 617, 628 (Mass. 1975). Rather than a viable solution, *Marker* is, as demonstrated by the Oregon Attorney General's use of this case below, part of the problem. *See* App. 14-20, 24-27; *see* Argument § (3), *infra*.

This petition allows the High Court the opportunity to address First and Fourteenth Amendment doctrines needing further clarification, including overbreadth, vagueness, prior restraint, and the heckler's veto, all in the context of a statute limiting pure speech in quintessential public fora. The heckler's veto is especially in need of explication given the paucity of Supreme Court cases addressing this doctrine and the jurisprudential questions arising out of the calibration of free speech undertaken by *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 2499, 147 L.Ed.2d 597, 622 (2000). *See also id.* at ___ U.S. ___, 120 S. Ct. at 2507-09, 147 L.Ed.2d at 632 (Scalia, J., dissenting); *see also id.* at ___ U.S. ___, 120 S. Ct. at 2519, 147 L.Ed.2d at 646 (Kennedy, J, dissenting). It is also notable that the ramifications of this petition reach far beyond the State of Oregon, potentially affecting ordinances and statutes the nation over. *See infra*.

2. Governments other than Oregon yet maintain the 1962 Model, while some governments have scrapped the Model as unconstitutional.

Governments other than Oregon maintain laws strikingly similar to the original Model.[3] (*See, e.g.*, N.Y. Penal Law § 240.20 (Consol. 2000)[4]; Ala. Code § 13A-11-7 (2000)[5]; 18 Pa. Cons. Stat. § 5503(a) (2000)[6]; Del. Code Ann. 11 § 1301 (2000); Conn. Gen. Stat. § 53a-182 (1999); Vt. Stat. Ann. 13 § 1026 (2000)[7]; N.H. Rev. Stat. Ann. § 644:2 (2000)[8]; S.D. Codified Laws Ann. § 22-13-1 (2000); Utah Code Ann. § 76-9-102 (2000); Ohio Rev. Code Ann. § 2917.11 (Anderson 2000)[9]; Ky. Rev. Stat. Ann. § 525.060 (Baldwin 2000)).[10]

---

[3] Oregon's neighbor to the north makes use of the 1962 Model only in the event of the governor proclaiming a state of emergency. *Compare* Wash. Rev. Code § 43.06.240 (2000) *with* Wash. Rev. Code 43.06.010(12) (2000). Oklahoma has adopted a Model similar to Washington's. *See* Okla. Stat. 21 § 1321.8 (1999). Because these are emergency provisions, they are not implicitly challenged by this petition seeking *certiorari*.

[4] *See People v. Tichenor*, 680 N.E.2d 606 (N.Y.), *cert. den'd*, 118 S. Ct. 307 (1997).

[5] *See Sterling v. State*, 701 So.2d 71 (Ala. Crim. App. 1997).

[6] *See Pennsylvania v. Mastrangelo*, 414 A.2d 54 (Pa. 1980); *see also* 37 P.S. § 102 (2000).

[7] *See Long v. L'Esperance*, 701 A.2d 1048 (Vt. 1997).

[8] *See New Hampshire v. Murray*, 605 A.2d 676 (N.H. 1992).

[9] *Compare City of Fairborn v. Grills*, 1994 Ohio App. LEXIS 2467 (Ohio App. 1994) *with Ohio v. Scott*, 704 N.E.2d 265 (Ohio App. 1997) (noting that the City ordinance is much narrower in scope and reach than the state statute). *See also City of Middleton v. Ramsey*, 535 N.E.2d 315 (Ohio App. 1988).

[10] *See Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L.Ed.2d 584 (1972) (a limited review of a portion of the Model).

New England's history with the 1962 Model demonstrates the need for Supreme Court review. In the 1960's, the Massachusetts Supreme Judicial Court adopted the Model as a limiting construction for the legislature's otherwise anachronistic "common night walkers . . . [who] annoy persons" statute. *See Alegata v. Commonwealth*, 231 N.E.2d 201, 211 (Mass. 1967). In the next decade, recognizing that the times and First Amendment jurisprudence had changed, Massachusetts' highest court narrowed this definition of disorderly conduct to encompass only activities not implicating the "lawful exercise of a First Amendment right." *A Juvenile*, 334 N.E.2d at 628. To ensure that result, the Court modified its earlier definition by striking the "unreasonable noise" clause, and setting forth a limiting construction mandating that the Model be employed only against conduct, and never against expressive activity. *See id.* at 629.

This same anachronistic Model recently split Connecticut's highest court. In *Indrisano*, Chief Justice Katz and Justice Foti limited their analysis as to scope and review, seemingly doing all that they could to sidestep the "unreasonable noise" clause. *See, e.g.*, 640 A.2d at 989, n.4. Justice Berdon dissented, 640 A.2d at 999, addressing the entire statute head-on. Justice Berdon found the Model vague.[11] (According to the majority, Justice Berdon also overstepped the record below to find the Model overbroad. 640 A.2d at 989 n.4.) Thus while Massachusetts and Connecticut are close geographically, their

---

[11] Justice Berdon built upon *Marks v. Anchorage*, one of the decisions striking the 1962 Model statute as facially unconstitutional. *Indrisano*, 640 A.2d at 1002-03.

highest courts are far apart when it comes to First Amendment jurisprudence in light of the 1962 Model. A mere step across state lines results in quite different standard as to the exercise of "annoying" free speech.

Johnson v. United States, 394 U.S. 952, 89 S. Ct. 1277, 22 L.Ed.2d 489 (1969), *cert. den'd*, (Marshall, J., dissenting from denial of *certiorari*), reveals that the Model was once the law governing disorderly conduct in all federal recreational areas. *See* 36 C.F.R. § 2.7 (1982), replaced by 48 Fed. Reg. 30,282 (1983) (since repealed).[12] The language used in section 2.7 has been purged from federal law in all areas save two: on Indian reservations (25 C.F.R. § 11.441 (2000) & 58 Fed. Reg. 54,406 (2000) and on Midway Atoll (50 C.F.R. § 38.9 (2000)). Thus the United States government, like Oregon and many other state and local governments, yet maintains the 1962 Model, albeit with much less vigor than it did in decades past.

---

[12] The federal government's proposal to change the wording of the "frequently used regulation" noted that "[t]he proposed revision of this regulation is designed to accomplish two objectives: (1) Eliminate potentially unconstitutional language in the existing regulation (by replacing terms such as "annoy" and "inconvenience" with more precise concepts); and (2) Provide a clear guide to agency enforcement action."
47 Fed. Reg. 11,598 (1982).

ARGUMENT

1. The 1962 Model fails to define or limit unreasonable noise, alarm or annoyance.

Because it so closely tracks the Model, nowhere on the face of the Oregon statute does it exclude First Amendment-protected activities from the category of "unreasonable noise." Nowhere on the face of the Oregon statute does it define public inconvenience, annoyance or alarm. Nowhere on the face of the Oregon statute does it mandate that public inconvenience, annoyance or alarm not be used as a pretext for silencing speakers who, in the well-worn words of this Court, raise their voices in a bid to "invite dispute." *Terminiello v. Chicago*, 337 U.S. 1, 4, 93 L.Ed. 1131, 69 S. Ct. 894 (1949). This despite the fact that such speech "may indeed best serve [the First Amendment's] high purpose [by] induc[ing] a condition of unrest, [by] creat[ing] dissatisfaction with conditions as they are, or even [by] stir[ring] people to anger." *Id.* Nowhere on its face does the Oregon statute make room for the fact that "[s]peech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id.* Instead this anachronistic statute was construed, in 1975, in a fashion which yet allows the annoying, alarming and even disturbing speech ostensibly protected and celebrated by *Terminiello* to be quashed as "unreasonable noise [constituting] a public inconvenience, annoyance or alarm." *See* limiting construction analysis, *infra*.

2. The 1962 Model fails to define when a risk of public inconvenience, annoyance or alarm is recklessly created.

How is the noisemaker, in this case one voicing religious concerns in traditional public fora during daylight hours, to know when the ill-defined threshold *"recklessly creates a risk of public inconvenience, annoyance or alarm"* is crossed? Evidently one can, without running afoul of the law, *negligently* create a risk of public inconvenience, annoyance or alarm via unreasonable noise while engaging in constitutionally protected free speech. Police officers are charged with the duty of arresting the unreasonable noisemaker (such as unamplified street preachers) only when negligence transitions into recklessness. This transition cannot be based, however, upon actual harm, for the "unreasonable noise" (*i.e.*, disturbing message) is to be curtailed *prior* to reaching that point. That is, legal liability attaches while the "noise" yet constitutes only a "risk" that the public *could be* inconvenienced, annoyed or alarmed. Thus the State of Oregon charges its policing authorities with the duty of weighing the risks, and then censoring unamplified speech occurring in traditional public fora in broad daylight once it becomes "unreasonable noise" merely threatening to annoy or disturb the public. Oregon's religious, social and/or political dissenters are therefore charged with the duty (assuming that they wish to avoid prosecution) of reading the minds of Oregon's police officers and ramping down their rhetoric *before* it could be perceived as "unreasonable noise" creating a risk of public annoyance. Thus the Model, by its very existence, chills free speech in the public fora.

This is no tortured reading of the statute, for the Oregon trial court concluded that "I am not [finding] that [Mr. Knezevich] created a risk of public inconvenience, annoyance or alarm, but it was such that it *could cause*, it *could cause* public inconvenience, annoyance or alarm." App. 12 (emphasis in original). Thus the Oregon courts convict under the Model in order to punish the "risk of a risk." The Model lends itself to this end by targeting "unreasonable" speech that threatens a risk of public annoyance. In other words, not actual harm, not *Terminiello*'s "substantive evil," 337 U.S. at 4, but rather speculative harm. Neither of the reviewing courts of appeal found this reading of the law impacting upon the First Amendment problematic.

Oregon's Attorney General embraces this grave jurisprudential error. That office argued on appeal that "[b]y its plain terms, the statute only requires the state to prove that defendant's conduct *recklessly created a risk of* public disruption, not that he actually and intentionally caused disruption." App. 21 (emphasis in original). Thus the State of Oregon unabashedly deputizes its officers and its judiciary with the authority to squelch potentially free speech prior to its utterance, based only upon the effect said speech is expected to have upon listeners. Such deputization, which constitutes nothing less than both a prior restraint and a heckler's veto, is made possible due to the Model's overbreadth, and is facilitated by the Model's inherent ambiguity.

3. The so-called limiting construction Oregon's courts place upon the 1962 Model does not remedy its significant constitutional defects.

As the State of Oregon argued throughout its previous briefing, Oregon's judiciary has decreed that "unreasonable noise" in violation of the statute may include speech "only if there is a clear and present danger of violence or if the communication is not constitutionally protected speech *but merely a guise to disturb persons.*" *Marker*, 21 Or. Ct. App. at 678-79 (emphasis added).[13]

Given the ambiguity and overbreadth inherent in the wording of the statute, this ostensible "limiting construction" creates no safety net. *Marker* brought the Model closer to its roots in *Terminiello* by tracking its language: "Freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a *clear and present danger of a substantive evil that rises far above* public inconvenience, annoyance, or unrest." 337 U.S. at 4 (emphases added). But the *Marker* court then veered away from *Terminiello*, and toward a heckler's veto, when it added "but *merely a guise to disturb persons*" as an alternative path to conviction (by a mere finding of preponderance, App. 10, 12) under the Model.

---

[13] The *Marker* court rejected an overbreadth and vagueness challenge a quarter-of-a-century ago, after duly noting that "[t]here is a respectable line of authority holding that the term 'making an unreasonable noise' is not specific enough to satisfy the requirements of a penal statute." *Id.* at 676. That respectable line of authority has grown in the past 25 years, but is not yet impregnable enough to protect the constitutional rights of the likes of Mr. Knezevich – at least not in Oregon.

The logic employed by Oregon's Attorney General reveals the tenuous nature of this ostensible limitation. "[U]nder *Marker*," deduced the State of Oregon, "the use of speech as a guise to disturb others is not constitutionally protected." App. 18. In other words, Oregon has adopted a "our police officers will know it when they see it" test for constitutionally protected speech,[14] and has categorically placed communication uttered as a "guise to disturb others" in the realm of non-constitutionally protected speech.[15] This reasoning carried the day in the trial court, and was implicitly accepted by Oregon's appellate and Supreme Courts, both of which refused to reverse the trial court's conclusion that Mr. Knezevich's religious communications in traditional public fora during daylight hours constituted "unreasonable noise."

Thus the Oregon courts deferred and implicitly approved the *Marker*-esque construction placed upon the Model by the Attorney General. The Model, *Marker*, and the Attorney General's interpretation of both are properly before this Court. The long-standing rule of statutory construction in a constitutional challenge is that where an administrative agency charged with enforcing a statute has interpreted it, that construction should be considered and analyzed by the court, even in a facial challenge.

---

[14] If the statute required licensing this would certainly constitute unbridled discretion. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 100 L.Ed.2d 771, 108 S. Ct. 2138 (1988) (decision to permit free speech may not be vested 'in the unbridled discretion' of government employees).

[15] Yet the protection of disturbing speech is precisely what the *Terminiello* Court (as well as others) lauded as the fulfilment of one of the First Amendment's *highest purposes*. 337 U.S. at 4.

Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 131, 112 S. Ct. 2395, 120 L.Ed.2d 101(1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96, 109 S. Ct. 2746, 2758, 105 L.Ed.2d 661 (1989) ("[a]dministrative interpretation and implementation of a regulation is, of course, highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.' " (*quoting Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982)); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S. Ct. 790, 63 L.Ed.2d 22 (1980) ("The Court has often repeated the general proposition that considerable respect is due 'the interpretation given [a] statute by the officers or agency charged with its administration.' " (*quoting Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L.Ed.2d 337 (1978)).

CONCLUSION

By granting this petition for *certiorari*, this Court can issue a decision serving to calibrate and standardize the protections extended to those exercising even personally "disturbing" and publicly "annoying" First Amendment protected rights, from sea to shining sea.

Respectfully submitted,

BRYAN J. BROWN*
STEPHEN M. CRAMPTON
AMERICAN FAMILY ASSOCIATION
CENTER FOR LAW & POLICY
100 Parkgate Drive, Suite 2-B
P.O. Drawer 2440
Tupelo, MS 38803-2440
(662) 680-3886

Counsel of Record

APPENDIX

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. GEORGE WADE KNEZEVICH, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court Case No. 9803-42304 SC S47384 CA A104197 ORDER DENYING REVIEW

Upon consideration by the court.

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 24th day of October 2000.

/s/ W. MICHAEL GILLETTE
W. MICHAEL GILLETTE
PRESIDING JUSTICE

Carson, CJ., not participating

c: David John Amesbury
George Wade Knezevich
Norman L. Lindstedt
Bryan J. Brown

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

STATE OF OREGON, Respondent, v. GEORGE WADE KNEZEVICH, Appellant,	)))))))	Multnomah County Circuit Court No. 9803-42304 CA A104197 **(Filed February 2, 2000)**

Date argued or submitted on briefs: January 7, 2000
Before: Landau, Presiding Judge, and Linder and Brewer, Judges
Attorney for Appellant: George Wade Knezevich *pro se*
Attorney for Respondent: David J. Amesbury
AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

PREVAILING PARTY: Respondent

[ ] No costs allowed [ ] costs allowed, payable by:

Appellate Judgment COURT OF APPEALS
Effective Date: December 19, 2000 (seal)

APPELLATE JUDGMENT

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. **GEORGE WADE KNEZEVICH,** Defendant-Appellant.	)))))))	**Multnomah County Circuit Court No. 9803-42304** **Appellate Court No. A104197**

RESPONDENT'S BRIEF

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable HAROLD BLANK, Judge

GEORGE WADE KNEZEVICH
Pro Se
18450 NW Heritage Parkway #121
Beaverton, OR 97006

HARDY MYERS #64077
Attorney General
MICHAEL D. REYNOLDS #4269
Solicitor General
DAVID AMESBURY #89419
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Telephone (503) 378-4402

Attorneys for Plaintiff-Respondent

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Except for defendant's statement of the questions presented, the state accepts defendant's statement of the case as adequate for review, as supplemented by the facts set forth in the state's supplemental statement of facts and argument.

Supplemental Statement of Facts

On March 1, 1998, Cindy Mitchell heard loud noises outside her home. (CTA 235650, Side A, 4453-4454). Mitchell lived across the street from the Church of Latter Day Saints. (CTA 235650, Side A, 4250-4276). Mitchell looked out and saw defendant walking up and down the sidewalk in front of the church, yelling at cars as they passed by. (CTA 235650, Side A, 4254-4714). Mitchell's windows and doors were closed, but she could still hear defendant yelling from across the street. (CTA 235650, Side A, 4530-4555). Mitchell found defendant's behavior very disturbing. (CTA 235650, Side A, 5409-5415).

Mitchell watched as a car drove up to the front of the church and two elderly women were helped out of it. (CTA 235650, Side A, 4930-4955). The women were

hunched over and clearly very elderly. (CTA 235650, Side A, 4955-4962). While they were trying to exit the car, defendant walked over to them and started yelling at them in a very loud voice while sticking his finger "nearly right in their face[s] and chest[s]." (CTA 235650, Side A, 5045-5160). Mitchell testified:

> It bothered me deeply when I saw him approach the two elderly women and come right into their space. There was not even a foot between his finger and their face[s].

(CTA 235650, Side A, 5045-5160). Defendant's conduct hindered the women's progress to the church (CTA 235650, Side A, 5750-5772). Mitchell found defendant's conduct "very harassing * * * and completely uncalled for[,]" especially since it appeared that the women could not get away from him. (CTA 235650, Side A. 5045-5164). From her position across the street, Mitchell testified that she could clearly hear defendant yelling. (CTA 235650, Side A, 5045-5160). After observing defendant's interaction with the two women, Mitchell decided his actions were "too much" and called the police. (CTA 235650, Side A, 5045-5160).

Fifteen-year police veteran Dan Costello and police officer Shaw responded to Mitchell's complaint. (CTA 235651, Side A, 9260-9676). When the officers first arrived at the area, they parked their vehicle about one block away from S.E. Lexington. (CTA 235651, Side A, 9500-9507). The officers approached defendant and Dwaine Wolcott, who were standing at the northeast corner of Milwaukee and the church. (CTA 235651, Side A, 9810-9833).

Officer Costello spoke with defendant about defendant's right to demonstrate and some of the restrictions on demonstrations under the disorderly conduct statutes. (CTA 235651, Side A, 9833-9876). Officer Costello explained that although defendant had the right to demonstrate in that area, there were certain things defendant could not do under the statute. (CTA 235651, Side A, 9876-9969). He further explained that defendant could not block the sidewalk, and should keep his speaking to a normal tone of voice. (CTA 235651, Side A, 9876-9969).

Defendant immediately complained that Officer Costello was not letting him preach. (CTA 235651, Side A, 9969-9975). Officer Costello responded that he was not saying defendant could not preach, but merely trying to explain what defendant must do to obey the law. (CTA 235651, Side A, 9975-10020). Officer Costello testified that during their extended discussion:

> [Defendant] was very in my face about the fact that we just couldn't seem to communicate. * * * I wouldn't call it antagonistic. That- * * * maybe is too harsh of a term, but it was kind of like we were standing there toes to toes and I was trying to tell him one thing and he wouldn't acknowledge that; he'd come back with * * * accusing me of not letting him preach.

(CTA 235651, Side A, 9969-10336).

Afer the third or fourth time of explaining the law to defendant and responding to his arguments, Officer Costello felt he had gotten his point across, told defendant he was done talking, and walked back towards the police vehicle. (100336-10550). The officers had walked about

one-half to two-thirds of a block when they heard defendant "screaming at the top of his lungs." (CTA 235651, Side A, 10550-10613). Officer Costello testified:

> [Defendant] was [sic] a mixture of the same kind of thing towards the church, and then he was also saying "Officer Costello is a sinner, Officer Costello is not letting me do my job, Officer Costello has violated my rights," and things like that. I turned around from my position, like I say, one-half to two-thirds of a block eastbound from that corner and could hear him quite clearly. Like I say, he was screaming at the top of his lungs.

(CTA 235651, Side A, 10613-10834).

While defendant was yelling and screaming, Officer Costello saw a car come to a very sudden slow-down (CTA 235651, Side A, 1-834-10854). The driver was clearly looking at defendant as defendant waved his cross and sign, and yelling at the officer. (CTA 235651, Side A, 10854-10910). Because of a sudden slow down, a second car almost rear-ended the slowing vehicle. (CTA 235651, Side A, 10854-10910). Defendant was holding a sign and a cross and was "waving them around wildly." (CTA 235651, Side A, 11156-11214). Defendant's screaming and its consequence of slowing down cars, led Officer Costello to conclude that he had probable cause to arrest defendant for disorderly conduct, so he placed defendant under arrest. (CTA 235651, Side A, 11214-11730). Officer Costello testified that it was the volume of defendant's voice that he considered annoying, not the content of defendant's speech. (CTA 235652, Side A, 13003-13151).

The officers did not arrest any other protestors [sic]. (CTA 235651, Side A, 12172, 12363).

At the end of the State's case, defendant moved the court for a judgment of acquittal. (CTA 235652, Side A, 15718-15811). Defendant argued that the state had failed to meet its burden of proving disorderly conduct by failing to prove that: (1) defendant caused "a clear and present danger of violence" or that his speech was "merely a guise to disturb people;" (2) a "group of persons" or "a portion of the community at large" was disturbed; and (3) defendant intended to cause "public inconvenience annoyance and alarm." (CTA 235652, Side A 15718-16145). The following exchange took place:

> [JUDGE]: The State has rested and has satisfied the prima facie case in the record. You may call your first witness. * * *
>
> [DEFENDANT]: [B]efore I call a defense witness I would like to make a motion for judgment of acquittal at this time * * *
>
> [Judge]: Well, I just made a comment that satisfied a prima facie case, but you might be able to change my mind.
>
> [DEFENDANT]: Okay, well, let me give it to you. I'm asking for a judgment of acquittal at this time * * *
>
> [JUDGE]: Let me point out to you, the statute is worded [inaudible] in the disjunctive, it doesn't use the conjunctive "and" it uses the word "or." A person commits the crime of disorderly conduct if his intent is to create public inconvenience, annoyance or alarm, *or* recklessly creating a risk thereof. And the district attorney drafted this complaint under part 2 [of

> the statute], "or recklessly creating the risk thereof."
>
> [DEFENDANT]: They have not shown "intent," your honor, and they have not shown "public."
>
> [JUDGE]: An intent to do what? To recklessly create? * * * I am going to adhere to my earlier ruling a few moments ago, a prima facie case in the record [inaudible] * * * I reserve the right to reverse myself and hold otherwise * * * [inaudible] evidentiary portion of the trial.

(CTA 235652, Side A 15356-16461).

At the end of the State's closing remarks, the court announced a specific finding:

> Let me announce before we hear from [defendant] that I am making a specific finding, although this wasn't pleaded. Nonetheless, for the record I am making a specific finding that [defendant] did not * * * intend to cause public inconvenience, annoyance, or alarm. That brings us down to the question of whether or not the State has proved to me by the requisite standard of proof, namely, preponderance of the evidence, that his conduct was such as to recklessly create *a risk, a risk* of causing public inconvenience, annoyance or alarm.
>
> Recklessly. What does that mean? Well, we have to look elsewhere in the code at 161.085, definitions, to subsection 9: * * * Recklessly means that the person is aware of, and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists, the risk must be of such

> nature and degree that such risk thereof constitutes a gross deviation from the standard of care a reasonable person would observe in the situation.

(CTA 235652, Side B, 24487-24789).

During closing remarks, defendant reiterated his previous arguments and also contended that the disorderly conduct statute was unconstitutional on its face or vagueness and overbreadth. (CTA 235652, Side B, 24824-CTA 235653, Side A, 27202). The court denied defendant's motion to dismiss, finding:

> Now, as I hear the case, the disorderly conduct charge is not based on [defendant's] preaching of the gospel and is not based on [defendant's] expression of any particular religious belief. The disorderly conduct charge is based on the allegation that [defendant] recklessly created a risk of public inconvenience, annoyance or alarm by making unreasonable noise. And like I said * * * I'm specifically finding that there was not intent, no intent whatsoever on [defendant's] part to cause any public inconvenience, annoyance or alarm. The question is whether [defendant's] conduct was such that he recklessly created a risk of public inconvenience, annoyance or alarm. And I have read the statutory definition, * * * and have read it into the record, of the word "recklessly." * * *
>
> I'm holding that it's not essential that members of the public, other than police officers, press the charge. I need only find, or not find, as the case may be, that there was a [risk of] public inconvenience, annoyance or alarm. * * * It is not

necessary that members of the public step forward, file the complaint, file the charge, or assist the officer in making the arrest at the scene. I'm also satisfied that there were sufficient numbers of people present, both from the testimony elicited by the state and testimony elicited by the defense, * * * certainly more than two in that immediate area and in the near proximity where the alleged [inaudible] occurred to create an adequate number, assuming that I'm convinced in my mind, that the requisite standard of proof – that means by a preponderance of the evidence – that the conduct recklessly created a risk thereof created a public inconvenience, annoyance or alarm. There were enough people present that the defendant's conduct was such that he did violate the statute. * * *

I am convinced in my mind by a preponderance of the evidence, from the testimony elicited, and the totality of the circumstances as shown by the evidence * * * the defendant's conduct, although there was no wrongful intent or maliciousness to harm – nonetheless his conduct was such that he recklessly created a risk of causing public inconvenience, annoyance or alarm. I'm not saying that he created a risk of public inconvenience, annoyance or alarm, but it was such that it *could cause*, it *could cause* public inconvenience, annoyance or alarm.

(CTA 235652, Side B, 27589-28343). The court convicted defendant of disorderly conduct and pronounced sentence. (CTA 235652, Side B, 28343-28519).

ANSWER TO FIRST ASSIGNMENT OF ERROR

The trial court did not err in denying defendant's motion for judgment of acquittal.

ARGUMENT

A. Standard of review

Defendant was convicted of disorderly conduct. (App Br at App-3). The offense was charged and tried as a violation. (App Br at App-1). At trial the state had to prove the elements of the offense by a preponderance of the evidence. ORS 153.805(2); *State v. Rider*, 157 OR App 480, 486, 970 P2d 258 (1998) (proof by preponderance of the evidence necessary to convict of violation).

When charged as a violation, a disorderly conduct case does not involve equitable relief. Rather, the only question is whether the defendant will be ordered to pay a fine set by statute. *E.g.*, ORS 161.565(2)(b), .565(4), 161.635(3). consequently the underlying case should be treated as an action at law, and this court should review for errors of law, *Reger v. White*, 49 Or App 43, 47-48, 618 P2d 1304 (1980); *see also, Dewing v. Western Smelting & Metals, Inc.*, 135 OR App 397, 400, 898 P2d 224, *rev den* 322 Or 167 (1995). In conducting its review, this court is bound by the trial court's findings of fact if there is evidence in the record to support them. *Dewing*, 135 Or App at 399; ORS 19.415(1); Or Const. Art. VII (Amended), § 3. To the extent the trial court did not make express findings of fact, this court presumes that the trial court found facts in a manner most consistent with the trial

court's ultimate ruling. *Ball v. Gladden*, 250 or 485, 487, 443 P2d 621 (1968).

B. The state adduced sufficient evidence to support a finding of guilt.

Defendant argues that the state failed to meet its burden of proving that his conduct fell within the meaning of the words "unreasonable noise," because "speech is not noise." (App Br 9). He is mistaken. "Unreasonable noise" may include speech when it is used merely as a guise to disturb persons. *State v. Marker*, 21 Or App 671, 678-79, 536 P2d 1273 (1975). Because there was sufficient evidence for a rational factfinder to find defendant guilty of disorderly conduct by a preponderance of the evidence, the court correctly denied defendant's motion for judgment of acquittal.

The statute governing disorderly conduct provides, in relevant part:

> (1) A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, *or recklessly creating a risk thereof*, the person:
>
> * * *
>
> (b) Makes unreasonable noise * * *.

ORS 166.025(1)(b) (emphasis added). This court has narrowed the application of the statute in situations where the "unreasonable noise" involves speech. In *Marker* this court held that when speech is involved, it can be classified as prohibited noise "only if there is a clear and present danger of violence or if the communication is not

constitutionally protected speech but merely a guise to disturb persons. *Marker*, 21 Or App at 678-79. Defendant's conduct fits within the latter category – it was merely a guise to disturb others.

The disorderly conduct charges arose out of defendant's loud shouting and screaming. Mitchell testified that from inside her house, she could hear defendant across the street screaming, even with her doors and windows closed. Defendant's actions greatly disturbed her. As part of his actions, defendant confronted two elderly women and, pointing his finger in their faces and chests, yelled at them loudly enough for Mitchell to clearly hear from across the street. Mitchell testified that defendant's behavior appeared "very harassing," "unreasonable" and "completely uncalled for."

Officer Costello, who responded to the call about defendant's activities, testified that he was annoyed not by the content of defendant's speech, but by the unnecessarily loud volume. He could hear defendant "screaming at the top of his lungs" from one-half to two-thirds of a block away.

As the trial court explained, "the disorderly conduct charge [was] not based on [defendant's] preaching of the gospel * * * [or on defendant's] expression of any particular religious belief. The disorderly conduct charge [was] based on the allegation that [defendant] recklessly created a risk or public inconvenience, annoyance or alarm by making unreasonable noise." (CTA 235652, Side A 15356-16461).

Based upon the facts in the record, a rational fact-finder could have determined that it was more likely than not that defendant's shouting was not an attempt to communicate, but merely an excuse to make loud noises that disturbed other people. Indeed, the trial court was convinced "by a preponderance of the evidence, from the testimony elicited, and the totality of the circumstances as shown by the evidence * * * [that] the defendant's conduct * * * was such that he recklessly created a risk of causing public inconvenience, annoyance or alarm." (CTA 235652, Side B, 27589-283443). In reaching that conclusion, the trial court necessarily found that defendant's loud screaming was not an attempt to communicate, but merely a guise to disturb others. *Marker*, 21 Or App at 678-79. To the extent that factual determination is not expressly stated, it is implicit in the trial court's verdict, and this court is bound by that implicit finding. *Ball v. Gladden*, 250 Or at 487. Consequently, because there was some evidence from which a reasonable trier of fact could determine that defendant's conduct met the elements of ORS 166.025(1)(b), as narrowed by *Marker*, the court appropriately denied defendant's motion for judgment of acquittal.

Defendant claims that *State v. Powlowski*, 116 Or App 186, 840 P2d 1322 (1992), supports his argument that the state failed to prove the requisite "unreasonable noise," because "sometimes 'Noise' is not 'Noise'" (App Br 11). Defendant misinterprets that case. In *Powlowski*, this court struck down as overbroad on its face a city ordinance that prohibited sounding automobile horns except in emergencies. *Powlowski*, 116 Or App at 192. The *Powlowski* court held that, under the facts of that case, the use

of automobile horns to signal support for protestors constituted protected "speech." *Id.* at 190. The court further stated, however, that sounding a mechanical devise is not necessarily protected speech under all circumstances. *Id.* at 189. Obviously, the sounding of mechanical devices for the purpose of disturbing others would not be protected speech. *See, e.g., State v. Hibbard*, 110 Or App 335, 339, 823 P2d 989 (1991), *rev den* 313 Or 211, 830 P2d 596 (1992) (causing telephone to ring without communicative purpose not "speech"). Similarly, under *Marker*, the use of speech as a guise to disturb others is not constitutionally protected. *Marker*, 21 Or App at 678-79. The basis for the *Powlowski* court's holding was the failure to limit the ordinance only to "circumstances detrimental to the public interest." *Powlowski*, 116 Or App at 192. The court did not hold that noise is protected speech where the purpose of the noise is to disturb, rather than to communicate, and consequently, defendant's citation to that case does not assist him.

Unlike the statute in *Powlowski*, ORS 166.025(1)(b) is limited to circumstances detrimental to the public interest, where screaming and shouting, regardless of content or message, is used as a guise to disturb persons. *Marker* 21 Or App at 678-79. Defendant deliberately made loud noises by shouting and screaming. In deliberately creating that noise, under the guise of speech, defendant recklessly created a risk of public inconvenience, annoyance or alarm. Such screaming and shouting is not protected "speech." *Marker*, 21 Or App at 679.

Defendant also cites various federal decisions, claiming they are controlling. He contends, for example, that this case is controlled by *Terminiello v. Chicago*, 337 US 1,

69 S Ct 894, 93 LEd 1131 (1949). (App Br at 10). *Terminiello* did not involve a challenge to the sufficiency of evidence. Rather, in *Terminiello* the Supreme Court reversed a conviction under a Chicago ordinance that would have "permitted conviction * * * [for] speech [that] stirred people to anger, invited public dispute, or brought about a condition of unrest." *Terminiello*, 93 L Ed at 1135. The court stated that none of those content-based grounds could support a conviction in the face of a constitutional challenge. *Id.* Although the state does not disagree with the principles described in *Terminiello*, that case does not aid this defendant, because it does not address issues that are germane to his sufficiency of the evidence claim, nor, as discussed *infra*, does it control with regard to defendant's constitutional challenges to the disorderly conduct statute.

Defendant's reliance on *Gregory v. Chicago*, 394 US 111, 89 S Ct 946, 22 L Ed 2d 134 (1969) is similarly misplaced. Again, the case does not involve the sufficiency of evidence. Rather, it merely stands for the proposition that a demonstration, "if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." *Gregory*, 22 L Ed 2d at 136. As the facts make clear, defendant was arrested and charged precisely because his actions were not "peaceful and orderly." Consequently, *Gregory* does not aid him in challenging the sufficiency of the evidence to convict him.

Defendant argues, finally, that the evidence was insufficient to show the requisite *mens rea*. To support his conviction under the statute, the state had to show only that defendant recklessly created a risk of public inconvenience, annoyance or alarm. ORS 166.025. To meet that

burden, the state had to show that defendant was "was aware of and consciously disregard[ed] a substantial and unjustifiable risk" that his conduct could cause the proscribed effect. *See* ORS 161.085(9). The state made such a showing.

The evidence demonstrated that defendant was loudly shouting and screaming in front of a church. A police officer warned him about the restrictions on his activities imposed by the disorderly conduct statute. Defendant ignored that warning and continued to scream and shout. His conduct in making loud noises clearly was intentional – defendant does not argue otherwise. Defendant contends, however, that when the narrowing construction announced in *Marker*, 21 Or App at 678-79, is applied to the trial court's findings, he is entitled to acquittal.

The trial court specifically found that defendant: "did not * * * intend to cause public inconvenience, annoyance, or alarm." Defendant argues that the finding precluded the trial court from deciding that his loud screaming was a "guise" to make noise under *Marker*. Defendant reads too much into the trial court's finding.

As discussed *supra*, in *Marker* this court held that:

> When speech is involved it can be classified prohibited noise only if * * * the communication is not constitutionally protected speech but merely a guise to disturb others.

Marker, 21 Or App at 678-79. Defendant argues that the term "guise" requires an intent to deceive. The state agrees with defendant to that point. Defendant then leaps to the conclusion that the trial court's finding that he did

not intend to cause public inconvenience, annoyance or alarm precludes the court from finding that his loud screaming was a guise to disturb persons. Defendant's characterization of the trial court's finding goes too far.

The gist of the trial court's finding was that defendant did not intentionally violate ORS 166.025. Its finding was announced using the terms of the statute: "inconvenience, annoyance or alarm." The trial court never suggested that defendant was not trying to disturb other people – it stated only that defendant did not deliberately violate ORS 166.025(1)(b). The trial court never stated that defendant's loud screaming was not a guise to disturb others, and by finding defendant guilty, it implicitly concluded that defendant *was* deliberately disturbing others. *See Ball v. Gladden*, 250 Or at 487. Defendant's argument that the state failed adequately to prove his intent consequently fails.

The state adduced sufficient evidence from which a rational factfinder could have determined that defendant purposely shouted louder than necessary; that he intended to disturb others by screaming and shouting; that the shouting created a risk of public inconvenience, annoyance or alarm; and that defendant thereby contravened the statute. The trial court correctly denied defendant's motion for judgment of acquittal.

ANSWER TO SECOND ASSIGNMENT OF ERROR

The trial court did not err in denying defendant's motion for judgment of acquittal.

ARGUMENT

A. Standard of review

This court is bound by the trial court's findings of fact if there is evidence in the record to support them. *Dewing*, 135 Or App at 399; ORS 19.415(1); Or Const Art VII (Amended), § 3. To the extent the trial court did not make express findings of fact, this court presumes that the trial court found facts in a manner most consistent with the trial court's ultimate ruling. *Ball v. Gladden*, 250 Or at 487.

B. The evidence adduced by the state supported the trial court's finding of guilt.

Defendant argues that the state failed to prove disorderly conduct by failing to show that he caused "*public* inconvenience, annoyance or alarm." (App Br 12-13) (emphasis added). Relying on *State v. Clark*, 39 Or App 63, 591 P2d 752, *rev den* 286 Or 303 (1979), *State v. Stubblefield*, 42 Or App 201, 600 P2d 469 (1979), and *State v. Gilbert*, 48 Or App 419, 617 P2d 288 (1980), defendant argues that to constitute a "public" offense under ORS 166.025(1), his actions had to actually impinge upon a substantial portion of the community. (App Br 13). Defendant misreads the statute and relies on cases that are no longer good law.

The plain language of the statute does not require proof of an actual impact on the public, but only creation of a *risk* of such impact. This court has expressly recognized that interpretation. *State v. Willy*, 155 Or App 279,

283, 963 P2d 739 (1998). Although the cases defendant relies on, *Clark*, *Stubblefield*, and *Gilbert*, offered a different interpretation, those cases are no longer good law. *See Willy* 155 Or App at 287. Defendant offers no other support for his argument, and it consequently fails.

Mitchell testified that defendant walked up to two elderly women and yelled comments that could be heard clearly from across the street. According to Mitchell, defendant's conduct appeared very harassing, unreasonable, and uncalled for. Officer Costello additionally testified that he could hear defendant from one-half to two-thirds of a block away, and that at least one car suddenly slowed in response to defendant's actions. Two automobiles almost collided as a result of the screaming. Defendant's actions all took place on a public sidewalk. The trial court implicitly found that defendant used screaming and shouting as a guise to make disturbing noises. Accordingly, the evidence was sufficient for the court to conclude, as it did, that defendant's conduct "was such that he recklessly created a risk of causing public inconvenience, annoyance or alarm." (CTA 235652, Side B, 27589-28343).

ANSWER TO THIRD ASSIGNMENT OF ERROR

The trial court did not err in denying defendant's motion to dismiss on the ground that ORS 166.025(1) was unconstitutionally vague and overbroad.

ANSWER TO FOURTH ASSIGNMENT OF ERROR

The trial court did not err in denying defendant's motion to dismiss on the ground that ORS 166.025(1)(b) was unconstitutionally vague and overbroad.

COMBINED ARGUMENT IN RESPONSE TO THIRD AND FOURTH ASSIGNMENTS OF ERROR

A. Standard or review

This court reviews the trial court's interpretation of constitutional and statutory provisions for errors of law. *State v. Cunningham*, 320 Or 47, 57, 880 P2d 431 (1994).

B. ORS 166.025(1) is not unconstitutionally vague.

A penal statute is unconstitutionally vague if it is "stated in terms from which those to whom it is addressed * * * cannot discern what conduct the lawmaker did or did not mean to include in the prohibition." *State v. Blocker* 291 Or 255, 260, 630 P2d 824 (1981). In reviewing a vagueness challenge to a statute, this court must construe the statute so as to preserve its constitutionality, if possible. *State v. Cantwell*, 66 Or App 848, 853, 676 P2d 353 (1984). A criminal statute is not void for vagueness merely because it uses general language to categorize and proscribe certain acts. *State v. Samter*, 4 Or App 349, 352, 479 P2d 237 (1971), *citing State v. Wojahn*, 204 Or 84, 137, 282 P2d 675 (1955). Rather, a statute is "sufficiently definite if persons of common intelligence can understand what is prohibited; it need not define an offense with such exactitude that a person could determine in advance whether specific conduct in all possible

factual circumstances will be found to be an offense." *Cantwell*, 66 Or App at 853; *accord Samter*, 4 Or App at 352.

This court has already upheld ORS 166.025(1)(b), the very section at issue in this case, against a vagueness challenge, stating:

> [W]e conclude that the action element of ORS 166.025(1)(b) is described with words of common usage with a well defined, well understood and generally accepted meaning, and, as written, enables men of common intelligence to understand what conduct is prohibited. We are satisfied that the language of ORS 166.025(1)(b) is not vague, and that it contains the requisite specificity for a penal statute.

Marker, 21 Or App at 677. Other sections of the statute have similarly been upheld against vagueness challenges. *See Cantwell*, 66 Or App at 852-53 (upholding ORS 166.025(1)(a)); *Clark*, 39 Or App at 67 (ORS 166.025(1)(h) not unconstitutionally vague); *State v. Donahue*, 39 Or App 79, 591 P2d 394 (1979) (ORS 166.025(1)(a) and (1)(c) not unconstitutionally vague).

Defendant asserts various attacks. He appears to claim that the statute is impermissibly couched in terms of ordinary language rather than in terms of specific measurable standards. (*E.g.* App Br at 17, 29-30, 33-35). A criminal statute is not void for vagueness, however, merely because it uses general language to categorize and proscribe certain acts. *Samter*, 4 Or App at 352.

Defendant also seems to suggest that in his case the decision both to charge him and to convict him rested

with the arresting officer, who was inadequately trained to apply the applicable statutory and constitutional provisions. (App Br at 18 and n 11). The record is clear, however, that defendant was tried before a judge. The statutory scheme does not operate as defendant suggests.

Defendant repeatedly attempts to characterize ORS 166.025(1)(b) as a content-based restriction on expression. (*E.g.* App Br at 19-21, 25-26, 32). It is not. The statute is directed at unreasonable noise, and its application does not depend upon the content of any affected communications. Under *Marker*, 21 Or App at 678-79, ORS 166.025(1)(b) does not even reach communicative speech, but, rather, only that speech which takes the form of unreasonable noise and which is being used as a guise to disturb other people.

Defendant claims that the Supreme Court's decision in *State v. Blair*, 287 Or 519, 524-25, 601 P2d 766 (1979) (holding former ORS 166.065(1)(c) unconstitutional) should invalidate ORS 166.025(1) because both statutes contain the words "annoyance and alarm."[1] (App Br 20). That decision, however, did not turn on the words "annoyance" and "alarm," but rather on the failure of the statute to adequately describe the prohibited conduct that

---

[1] Former ORS 166.065(1)(c) provides in pertinent part:

> A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, he:
>
> (c) Communicates with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm[.]

might lead to annoyance and alarm. Ors 166.025(1)(b) does not contain a similiar infirmity.

Despite his suggestions to the contrary, defendant has failed to cite any controlling authority for the proposition that ORS 166.025(1)(b) is unconstitutionally vague; he has not cited to any authority that would compel this court to depart from its holding in *Marker*, nor offered an argument explaining why this court should do so. Consequently, this court should abide by its prior decision.

C. ORS 166.025(1) is not unconstitutionally overbroad.

A penal statute is unconstitutionally overbroad "to the extent that it announces a prohibition that reaches conduct which may not be prohibited. * * * [T]o the extent that an overbroad law forbids what may not constitutionally be forbidden, it is invalid * * * ." *Blocker*, 291 Or at 261.

Defendant's overbreadth challenge is not markedly different from the one brought by the defendant in *Marker*, 21 Or App 671. Both concentrate primarily on statutory use of the words "unreasonable noise." *See Marker*, 21 Or App at 675; App Br at 22-25). As this court stated in *Marker*, however, both the terms "unreasonable" and "noise" are well-defined. *Marker*, 21 Or App at 675. This court went on to conclude that when construed to prohibit speech "only if there is a clear and present danger of violence or if the communication is not constitutionally protected speech but merely a guise to disturb persons[,]" ORS 166.025(1)(b) is not unconstitutionally overbroad. *Id.* at 678-79.

The cases cited by defendant as "controlling" are not. Unlike the defendant in *Terminiello*, 93 LEd 1131, defendant in the instant case was not charged with disorderly conduct based on communicative speech that created a risk of inconvenience, annoyance, or alarm. The trial court specifically found that the disorderly conduct charge was not based on the contents of defendant's preaching, but rather on the allegation that defendant recklessly created a risk of public inconvenience, annoyance or alarm by making unreasonable *noise*. The *Terminiello* court's findings, therefore, are not controlling. The other cases cited by defendant similarly fail to address the issue in this case.

The statute applied to defendant not because of the message he purportedly sought to impart, but because the evidence showed that he was merely using speech as a guise to disturb other people. Under *Marker*, that activity was not constitutionally protected. Defendant advances no significant argument that would justify this court in departing from its holding in *Marker*. Consequently, this court should abide by its decision in that case that ORS 166.025(1)(b) is not unconstitutionally overbroad.

CONCLUSION

For the forgoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

HARDY MYERS
Attorney General
MICHAEL D. REYNOLDS
Solicitor General

/s/ David J. Amesbury
DAVID J. AMESBURY
Assistant Attorney General

Attorneys for
Plaintiff-Respondent
State of Oregon

THE COURT OF APPEALS
FOR THE STATE OF OREGON

STATE OF OREGON Plaintiff-Respondent v. GEORGE WADE KNEZEVICH, Defendant, Appellant.	Multnomah County Trial Court Criminal No. 9803-42304 CA A104197

APPELLANT'S OPENING BRIEF
AND ABSTRACT OF RECORD

Appeal from the guilty judgment
of the Circuit Court for Multnomah County,
the Honorable Harold Blank presiding.

George Wade Knezevich
Pro se
18450 NW Heritage Parkway, #121
Beaverton, OR 97006
(Unpublished)

Hardy Meyers, OSB No. 64077
Attorney General
State of Oregon
400 Justice Building
Salem, OR 97310
(503) 378-4402

* * *

4. The State may not impinge on the right under the First Amendment of the U.S. Constitution and Article I,

sections 3 and 8 of the Oregon Constitution to the free exercise of religion and the expression of religious opinion.

ORS 166.025(1)(b), on its face, is overbroad in that it reaches speech activites which include activites [sic] so protected.

Subsection (b) of ORS 166.025(1) contains two words – "unreasonable noise."

Both words individually – and together as a clause – are unconstitutionally vague. They fail to define for the "reasonable man" what conduct is criminal. It also fails to give guidance to law enforcement officers as to what actions violate the statute.

Therefore, ORS 166.025(1)(b) is unconstitutionally vague and overbroad on its face.

STATEMENT OF THE FACTS

On March 1, 1998, at approximately 11:30 a.m., Defendant and three other ministers stood preaching on public sidewalks around a Mormon chapel sandwiched between Milwaukee Avenue and 17th Avenue in southeast Portland. Both Milwaukee Avenue and 17th Avenue are busy thoroughfares with regular Tri-Met bus traffic and automobile traffic to and from the close-in southeast part of Portland and the Sellwood District. The preachers used their natural, God-given voices, i.e., *without the aid* of any sound amplification equipment. Defendant held a cross in one hand and a sign reading, "Mormonism is a cult/Jehovah's Witnesses are a cult" in the other.

The court below took judicial notice the sidewalks upon which Defendant engaged in preaching were "dedicated to public use" (CTA 235651, Side 1, 065-070). At trial, Defendant offered, and the court received, photos of the scene (Def. Ex. 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142, 144, 146, 148, and 150) for illustration. Arresting Officer Costello ("Costello") identified the photographs in evidence as "representative" of the location where the incident took place as well as the position of Defendant during the time when the officer was present (CTA 235651, Side 2, 304-371; CTA 235652, Side 1, 037-043).

According to the printout of the Mobile Data Terminal ("MDT") (App. 11) from the 911 police dispatch (Def. Ex. 110), a call was received at 11:33 a.m. by the 911 operator from Cindy (Buck) Mitchell ("Mitchell") complaining about Defendant's, and others', activities. The caller did not sign a complaint against Defendant (CTA 235651, Side 1, 160-168).

The MDT also indicates that police arrived at 11:49 a.m. (Def. Ex. 110). By 12:13 p.m., Defendant was in custody and was taken to the Southeast Portland Precinct where he was charged with disorderly conduct under ORS 166.025 (Def. Ex. 118).

The Information of the District Attorney (App. 1; Dkt. 3) accused Defendant of "unlawfully and recklessly creat[ing] a risk of public inconvenience, annoyance and alarm by making an unreasonable noise * * * " charging Defendant under ORS 166.025(1)(b). The charge was to be tried as a violation.

Defendant moved for dismissal on several grounds (Dkts. 6, 11, 21, 23, 30, and 34), including facial unconstitutionality of the statute or parts thereof. The motions were all denied (CTA 235652, Side 1, 284-378[2]).

Trial took place on October 28, 1998. Defendant represented himself *pro se*.

At trial, the 911 caller, Mitchell, testified that her call was motivated more by Defendant's alleged "inappropriate" behavior towards two women going to the Mormon church than by the "noise" created by Defendant (CTA 235651, Side 1, 205-208).

In every case, Mitchell's testimony makes it clear that Defendant's speaking or shouting (whichever characterization she chooses) was directed words communicating with individuals or groups of people (CTA 235651, Side 1, 050-052).

Defendant was arrested for "making unreasonable noise" while holding a cross and a sign in broad daylight on a public sidewalk. Costello testified that he employed no measurable standard for sound (decibels) and that the Portland police did not even posses [sic] equipment to measure decibels (CTA 235652, Side 1, 130-137).

Costello testified that the representative photos were accurate as to Defendant's position on the day of the incident (Def. Ex. 122 and 128; CTA 235651, Side 2, 384-401; CTA 235651, Side 1, 427-449, 575-587, 645-662) and that Defendant's sign and cross posed no physical

---

[2] See also, e.g., CTA 235652, Side 2, 460-End; CTA 235653, Side 1, 000-043 and 081-201.

danger (Def. Ex. 142; CTA CTA 235651, Side 2, 438-461; also, CTA 235652, Side 1, 044-047).

Costello testified that, though Defendant was shouting, he was directing his words either at an assembled group outside the Mormon chapel or at him when he was approximately 100 feet way [sic] (CTA 235651, Side 1, 365-384, 397-398, 404-405, 408-417, 431-439, 567-630, and 647-663; CTA 235652, Side 1, 044-047).

None of the assembled group on the porch offered any complaint. In fact, when Costello spoke to one of them, they specifically declined to be involved (CTA 235652, Side 1, 083-094).

Costello testified that Defendant had called out to him that Costello was a "sinner" and that Costello was violating Defendant's constitutional rights (CTA 235651, Side 1, 365-384 and 608-612). In addition, Costello's report noted that Defendant had also called Costello a "liar" (App. 9, Def. Ex. 118, p. 3; CTA 235652, Side 1, 165-173).

Costello testified that he was "annoyed" with Defendant's preaching (CTA 235652, Side 1, 021-029).

No testimony was offered that Defendant's activities presented a "clear and present danger of violence."

When the State rested its case, Defendant moved that a verdict of not guilty be entered as the State had failed to satisfy the elements of the case under current case law (CTA 235652, Side 1, 284-378). Defendant argued three points substantially as follows:

1. The State has failed to prove disorderly conduct within the meaning of the words "unreasonable noise" as construed by the Oregon Court of Appeals, *State v. Marker*, 21 OrApp 671, 679 (1975):

> "When speech is involved it can be classified prohibited noise only if there is a clear and present danger of violence or if the communication is not constitutionally protected speech but merely a guise to disturb persons."

The State has not shown that my preaching caused "a clear and present danger of violence" *or* that it was "merely a guise to disturb people." As such, the statute is unconstitutional *as applied* in this case.

2. The state has failed to prove disorderly conduct within the meaning of the words "*public* inconvenience, annoyance or alarm" as construed by the Oregon Court of Appeals. *State v. Clark*, 39 OrApp 63 (1979); *State v. Stubblefield*, 42 OrApp 201 (1979); and *State v. Gilbert*, 48 OrApp 419 (1980):

> " * * * [a] defendant's act, no matter how reprehensible to any particular person, must disrupt a *group of persons* or a *portion of the community at large* * * * ." *Clark* at 66 (emphasis added)

> "Under *Stubblefield*, risk of inconvenience, annoyance, or alarm *to only two persons* does not come within the purview of the statute." *Gilbert* at 423 (emphasis added)

The State has not shown that a "group of persons" or "a portion of the community at large" was disturbed. On-duty police officers

are not "the public." As such, the elements of the statute have not been met.

3. The State has failed to prove the "intent" to cause "public inconvenience annoyance and alarm" required in section (1) of the statute. The harassment statute, ORS 166.065 has a nearly identical requirement and the Oregon Court of Appeals in *State v. Sallinger*, 11 OrApp 592 (1972) held:

> "The state is required to prove beyond a reasonable doubt that the defendant had the *specific* 'intent to harass, annoy or alarm.' " at 595 (emphasis in original)

In addition, the Oregon Court of Appeals in *State v. Sargent*, 74 OrApp 50, 701 P2d 484 (1985) applied the same construction to the "intent" section of the disorderly conduct statute of which I stand accused:

> " * * * if * * * [the court] did not find from the evidence the existence of the intent *as a matter of fact*, defendant is entitled to an acquittal." at 53 (emphasis in original)

As such, the State did not meet its burden to prove this element of the statute.

The court denied the motion (CTA 235652, Side 1, 284-378).

Further testimony demonstrated that, after Defendant was arrested, at least one other minister, Carl Thompson, was preaching loudly while Officer Costello was in close proximity. The officer warned Thompson against trespass but not against "noise" and did not arrest Thompson. (CTA 235652, Side 2, 168-205).

At closing arguments, Defendant reiterated the above motion and also moved that the case be dismissed on grounds of facial unconstitutionality (CTA 235652, Side 2, 454-End through CTA 235653, Side 1, 000-043). These motions were likewise denied (CTA 235653, Side 1, 081-201).

However, the court made a specific finding of fact that Defendant did not "intend to inconvenience, annoy or alarm anyon[illegible] (CTA 235652, Side 2, 425-437).

The court said:

> "I'm making a specific finding, although this wasn't pleaded, nonetheless for the record, I'm making the specific finding that Mr. Knezevich did not – *did not* – 'intend to cause public inconvenience, annoyance, or alarm.' " (Emphasis on tape)[3]

In addition, the court said:

> "I'm not saying that you created a risk of public inconvenience, but it was such that it *could* cause – it *could* cause, public inconvenience, annoyance, or alarm." (CTA 235653, Side 1, 139-147; emphases on tape)

The court pronounced a judgment of guilty and pronounced sentence (App. I; Dkt. 48, 49, and 50).

---

[3] See also, e.g., CTA 235652, Side 1, 487-501 and Side 2, 425-437, as well as CTA 235653, Side 1, 099-101 and 140-142)

FIRST ASSIGNMENT OF ERROR

The court erred in denying Defendant's motion for a verdict of not guilty for failure of the State to meet its burden to prove disorderly conduct within the meaning of the words "unreasonable noise" as construed by the Oregon Court of Appeals, in

State v. Marker.
Speech is not Noise

Marker, at 1227, held:

> "When speech is involved it can be classified prohibited noise only if there is a clear and present danger of violence or if the communication is not constitutionally protected speech but merely a guise to disturb persons."

Marker is on point for this case in that it was construing subsection (b) – the "unreasonable noise" provision of ORS 166.025(1) – under which Defendant was also charged. In order to convict anyone engaged in speech activity of the "unreasonable noise" element, according to *Marker,* either one of two criteria must apply to the communication. Either the speech must create a "clear and present danger of violence" *or* the speech is "merely a guise to disturb persons."

It is clear that the *Marker* court was alluding to a long train of free speech cases which require that speech be free unless there is a "clear and present danger" presented. These cases begin with *Schenck v. US,* 47, 39 SCt 247, 63 LEd 470 (1918) and continues until today – and quoted with authority in Oregon cases like *State v. Horn,* 57

* * *

THE SUPREME COURT FOR THE STATE OF OREGON

STATE OF OREGON Plaintiff-Respondent v. GEORGE WADE KNEZEVICH, Defendant, Appellant.	Multnomah County Trial Court Criminal No. 9803-42304 Oregon Court of Appeals No. CA A104197 Supreme Court No. ___

DEFENDANT KNEZEVICH'S PETITION FOR REVIEW

Appeal from the judgment of the Circuit Court for Multnomah County, the Honorable Harold Blank presiding. Affirmed Without Opinion by Landau, Presiding Judge, Linder and Brewer, Judges. Reconsideration denied on March 1, 2000.

If review is granted, petitioner intends to re-brief the merits of this case.

Norman L. Lindstedt, OR Bar No. 58060
Suite 1300
1001 S.W. 5th Ave
Portland, OR 97204
Telephone: 503.227-7904
Fax: 503.242.1217
Attorney for Petitioner Knezevich

Hardy Meyers, OSB No. 64077
Attorney General
State of Oregon
400 Justice Building
Salem, OR 97310
(503) 378-4402
Attorney for the State of Oregon

Bryan J. Brown. KS Bar No. 17634
AFA Center for Law and Policy
100 Parkgate Drive. Suite 2-B
P.O. Drawer 2440
Tupelo. MS 38803-2440
Telephone: 662-680-3886
Fax: 662-844-4234
Attorney for Petitioner Knezevich

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PRAYER FOR REVIEW 1

QUESTIONS FOR REVIEW 1

1. Is pure speech activity on busy public streets, sidewalks, and parks during normal daylight hours "noise" of a type unprotected by Article I, Section 8 of the Oregon Constitution and the First Amendment to the U.S. Constitution? 1

2. Is pure speech activity of this type, when of a religious nature, a "free exercise of religious opinion" and "freedom to worship" under Article I, Sections 2 and 3 of the Oregon Constitution? 1

3. Is "public inconvenience, annoyance and alarm" sufficient to overcome the free expression and freedom of religion rights of those engaged in pure speech activity of a religious nature on busy public streets, sidewalks, and parks during normal daylight hours? 2

4. Is the mere *possibility* or "risk" of public inconvenience, annoyance, and alarm sufficient to overcome the free expression and freedom of religion rights of those engaged in pure speech activity of a religious nature on busy public streets, side-walks, and parks during normal daylight hours?..... 2

5. Is speech that *"could cause* public inconvenience, annoyance or alarm" sufficient to meet the statutory element of "recklessly creating a risk of public inconvenience, annoyance or alarm" required for conviction?..... 3

6. Is a single complainant sufficient to constitute the "public" in "public inconvenience, annoyance or alarm"?..... 3

7. May an individual successfully advance a "surrogate" complaint of "public inconvenience, annoyance or alarm," advancing third party standing in a criminal matter, when there is no evidence that persons for whom the surrogate stands in had themselves complained, even though the evidence reveals that they were given adequate opportunity to press forward with a complaint? 4

8. Is ORS 166.025(1)(b) unconstitutionally vague and/or overbroad on its face? 4

9. Was ORS 166.025(1)(b) unconstitutionally applied?..... 5

THE FACTS OF THE CASE..... 5

WHY THE COURT SHOULD HEAR THIS CASE... 8

CONCLUSION 10

CERTIFICATE OF SERVICE 11

ABSTRACT OF RECORD .....

APPENDIX .....

TABLE OF AUTHORITIES

CASES:

Capitol Square Review and Advisory Board v. Pinette, 115 SCt 2440, 2446 (1995) 1

City of Eugene v. Powlowski, 116 OrApp 186 (1992) ..1, 18

Community Bank v. U.S. Bank, 276 Or 471, 478 (1976) 8

Giaccio v. Pennsylvania, 382 US 399 (1966) 4

Grayned v. City of Rockford, 408 US 104 (1972) 4

Gregory v. Chicago, 394 US 111 (1969) 8

Kreiser v. City of San Diego, 988 F2d 883, 898 (9th Cir. 1993) 1

Lanzetta v. New Jersey, 306 US 451 (1939) 4

Madsen v. Women's Health Center, Inc., 512 US 753 (1994) 5

McDaniel v. Paty, 435 US 618 (1978) 1

Meltebeke v. Bureau of Labor and Industries, 852 P.2d 859 (Or. App. 1993), aff'd, 903 P.2d 351 (Or. 1995) 2

NAACP v. Claiborne, 458 US 886 (1982) 2

State v. Hodges, 254 Or 21 (1969) 4

State v. Blair, 287 Or 519 (1979) 4

State v. Clark, 39 OrApp 63 (1979).....3, 8
State v. Gilbert, 48 OrApp 419 (1980).....3, 8
State v. Marker, 21 OrApp 671 (1975).....1, 2, 4, 8
State v. Robertson, 293 Or 402 (1982)..... 4
State v. Sallinger, 11 OrApp 592 (1972) 3, 8
State v. Sargent, 74 OrApp 50 (1985)..... 8
State v. Stubblefield, 42 OrApp 201 (1979).....3, 8
Terminiello v. Chicago, 337 US 1, 4 (1949) 2, 3, 4, 8

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:

Oregon Constitution, Article 1, Section 2..... 6
Oregon Constitution, Article 1, Section 3.....1, 6
Oregon Constitution, Article 1, Section 11..... 4
ORAP 9.07 ..... 6, 7, 8
ORS 166.025..... 1, 3, 5

* * *

In the Circuit Court of the State of Oregon for Multnomah County

STATE OF OREGON, Plaintiff, v GEORGE WADE KNEZEVICH DOB: 08/17/1990 Defendant.	))))))))	Court Nbr 98-03-42304 DA Case 1156661 Crime Report PP 98-21008 Information of District Attorney ORS 166.025 (1)

The above-named defendant is accused by this information of the offense(s) of COUNT 1 – DISORDERLY CONDUCT, committed as follows:

COUNT 1
DISORDERLY CONDUCT

The said defendant, on or about March 1, 1998, in the County of Multnoham, State of Oregon, did unlawfully and recklessly create a risk of public inconvenience, annoyance and alarm by making an unreasonable noise, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Dated at Portland, Oregon, in the county aforesaid, on March 17, 1998

MICHAEL D. SCHRUNK (67111)
District Attorney
Multnomah County, Oregon

By /s/ Jill Odell
Issuing Deputy

ODELL OSB 97358

Security Amount Citation to appear 3-19-98
Uniform Complaint Nbr PP C134570

AFFIRMATIVE DECLARATION

The District Attorney hereby affirmatively declares for the record, as required by ORS 161.563, upon the date scheduled for the first appearance of the defendant, and before the court asks under ORS 135.020 how the defendant pleads to the charge(s), the State's intention that any misdemeanor charged herein proceed as a violation.

MAR 19 1998 – CT Trial 4-20 2DRM124

166.025 Disorderly conduct. (1) A person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:

(a) Engages in fighting or in violent, tumultuous or threatening behavior; or

(b) Makes unreasonable noise; or

(c) Disturbs any lawful assembly or persons without lawful authority; or

(d) Obstructs vehicular or pedestrian traffic on a public way; or

(e) Congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or

(f) Initiates or circulates a report, knowing it to be false, concerning an alleged or impending fire, explosion, crime, catastrophe or other emergency; or

(g) Created a hazardous or physically offensive condition by any act which the person is not licensed or privileged to do.

(2) Disorderly conduct is a Class B misdemeanor.